No. 90455-3

SUPREME COURT
STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The dispute in this case centers on the question of whether Engrossed House Bill [hereinafter EHB] 2123, passed into law in 2011, prevented injured workers whose base time loss rates, prior to consideration of the maximum rate, were in excess of the maximum rate, from having their compensation rates adjusted as of July 1, 2011 to reflect the new maximum rate that went into effect on that date. The Superior Court and Court of Appeals properly determined that EHB 2123 did not prevent such adjustments.

The facts in this case were stipulated to so there is no dispute as to the material facts. Summary judgment was, therefore, appropriate and it does not appear that the Department of Labor and Industries [hereinafter Department] is arguing otherwise. The only dispute was which party should have been granted summary judgment.

Mr. Crabb's base time loss rate, calculated pursuant to RCW 51.32.090(1) and RCW 51.32.060, before applying the maximum cap, is in excess of the maximum time loss rate. Therefore, his time loss rate for the period at issue in this appeal should have been $4,816.20, the maximum time loss rate as of July 1, 2011.

Nothing in EHB 2123 changes the statutory scheme for calculating maximum time loss rates in cases such as Mr. Crabb's. Neither the

language of EHB 2123 nor any legislative history shows any intent by the legislature to alter the way maximum time loss rates are calculated. EHB 2123, therefore, should have no effect on this case.

The Department has failed to show that this case meets any of the criteria under Rule of Appellant Procedure 13.4(b) [hereinafter RAP 13.4(b)] that would warrant acceptance of review by the Supreme Court.

The decision of the Court of Appeals was correct and the Court should deny review of that decision.

II. STATEMENT OF THE CASE

This matter is before the Court based upon a petition for review filed by the Department to a June 5, 2014 decision of the Court of Appeals in *Crabb v. Dep't of Labor & Indus.*, ___ Wn.App. ___ (No. 44343-1-II, June 5, 2014)(slip. op.). The Court of Appeals affirmed a December 14, 2012 order from Pierce County Superior Court.

In the December 14, 2012 order the Superior Court reversed an October 1, 2012 order issued by the Board of Industrial Insurance Appeals [hereinafter Board] and reversed a letter and order issued by the Department on March 27, 2012. (CR, pp. 169 - 173). In the March 27, 2012 Department order, the Department affirmed four prior orders which had paid time loss benefits to Mr. Crabb. (CABR, Exhibits 2 & 4-7). The March 27, 2012 Department letter explained that the Department was

affirming these orders because the Department would not be increasing the maximum monthly payments made to injured workers in 2011 due to the enactment of EHB 2123. (CABR, Exhibit 3).

The facts in this case were stipulated to by the parties. Therefore, there are no factual disputes and this case presents a pure question of legal interpretation.

Mr. Crabb was injured on December 23, 2007 while working for Law Plumbing. (CABR, p. 54, Fact No. 1). He filed a claim for benefits for this injury under claim number Y-894653, and his claim was allowed by the Department. (CABR, p. 54, Fact No. 2).

Mr. Crabb's wage of injury was set by a Department order dated January 6, 2010. His monthly wage was set at $8,917.92 based on an hourly wage of $50.67, 8 hours per day, 5 days per week. The order also determined that Mr. Crabb was not married and had no dependent children at the time of his injury. (CABR, p. 54, Fact No. 4).

Pursuant to RCW 51.32.090(9)(a), the maximum monthly time loss rate increased from $4,715.30 effective July 1, 2010 to $4,816.20 effective July 1, 2011. (CABR, p. 55, Fact No. 8).

As a result of a cost of living freeze enacted in EHB 2123, the Department did not provide cost of living adjustments to claimants on July 1, 2011. (CABR, p. 55, Fact No. 9). The Department did, however, adjust

benefits on some claims between July 1, 2011 and June 30, 2012 for other reasons such as a change in the number of dependents, the cessation of employer-provided health care benefits, or the removal of a social security offset. (CABR, p. 55, Fact No. 10).

For claims with dates of injury before July 1, 2011, the Department's practice has been to apply the maximum rate in effect on the date of injury, then apply the new maximum rate in effect each July 1st, through July 1, 2010. For claims with a date of injury prior to July 1, 2011, the Department generally has not applied the July 1, 2011 maximum rate to compensation paid for wage loss benefits paid on or after July 1, 2011. The Department has, instead continued to pay benefits at the July 1, 2010 maximum rate on these cases. The Department does, however, apply the maximum rate effective July 1, 2011 to claims with dates of injury on or after July 1, 2011. In at least one case, involving a social security offset being removed effective July 1, 2011, the Department set the claimant's rate at the July 1, 2011 maximum rate even though he was injured prior to July 1, 2011. (CABR, p. 55, Fact No. 11).

III. ARGUMENT

In an appeal of a Board order to Superior Court, the trial is de novo, but is based upon the evidence presented before the Board. RCW 51.52.115; *Kingery v. Dep't. of Labor & Indus.*, 132 Wn. 2d 162, 937 P.2d 565 (1997);

Hanquet v. Dep't. of Labor & Indus., 75 Wn. App. 657, 879 P.2d 326 (1994).

In cases such as this where there are no factual disputes and the only issue is a question of law, there is no presumption that the Board's decision is correct. *Puget Sound Bridge & Dredging Co. v. Dep't of Labor & Indus.*, 26 Wn.2d 550, 174 P.2d 957 (1946).

This case requires interpretation of the Industrial Insurance Act [hereinafter Act]. When interpreting the Act it is important to remember that the Act is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); Citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 883 P.2d 1370 (1994); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). This means that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker..." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

Mr. Crabb's base time loss rate, before applying the maximum cap,

is in excess of the July 1, 2011 maximum time loss rate. Therefore, his time loss rate for the period at issue in this appeal should have been $4,816.20, the maximum time loss rate as of July 1, 2011.

A. THIS CASE DOES NOT MEET ANY OF THE CRITERIA GOVERNING CONSIDERATION FOR ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets out the criteria governing consideration for review providing that review will only be accepted if one or more of the criteria is met. The Department does not allege that the result in this case meets any of the first three criteria set out in RAP 13.4(b).

The final criteria is that the case involves an issue of substantial public interest. While the Department, in its petition for review, does allege that this case involves an issue of substantial public interest (see Petition for Review, pp. 8 & 18), the Department does little to explain why this is the case.

The effect of this case would be a beneficial one to workers, such as Mr. Crabb, whose benefits are capped at the maximum rate. While the Department suggests an adverse impact due to the need to collect taxes to fund these benefits, there is no indication that these minor raises to a limited number of workers would result in a significant financial impact on an agency as large as the Department of Labor and Industries.

B. MR. CRABB'S INITIAL TIME LOSS RATE BEFORE APPLYING THE MAXIMUM CAP WAS $5,350.57 PER MONTH.

RCW 51.32.090(1) provides that a worker's time loss rate is to be based on the calculation methods set forth in RCW 51.32.060.

Pursuant to RCW 51.32.060(1) a worker's initial rate of compensation is calculated using his or her wage of injury multiplied by a percentage that is based on the worker's marital status and number of dependent children. For an individual such as Mr. Crabb who is single with no dependents, the percentage is 60 percent. RCW 51.32.060(1)(g).

Multiplying Mr. Crabb's wage of injury of $8,917.62 (CABR, p. 55, Fact 4), by 60 percent results in an initial time loss rate of $5,350.57.

C. MR. CRABB'S TIME LOSS RATE IS SUBJECT TO THE MAXIMUM RATE CAP.

RCW 51.32.090(9) sets a maximum amount that a worker's monthly time loss rate cannot exceed. For workers such as Mr. Crabb who were injured after June 30, 1996, the maximum rate is 120 percent of the average monthly wage in the state as computed under RCW 51.08.018. RCW 51.32.090(9)(a).

The maximum time loss rate effective July 1, 2011 was $4,816.20. (CABR, p. 55, Fact 8). Since Mr. Crabb's initial time loss rate, but for the maximum cap, exceeded this number, his time loss rate effective July 1,

2011 should be $4,816.20.

D. THE SUPERIOR COURT AND COURT OF APPEALS WERE CORRECT IN HOLDING THAT EHB 2123 DID NOT CHANGE THE WAY MAXIMUM TIME LOSS RATES ARE CALCULATED FOR WORKERS SUCH AS MR. CRABB.

The Superior Court explained that in passing EHB 2123, the legislature did not expressly modify RCW 51.32.090(9), the maximum rate statute. The court also pointed out that the legislature did not show any clear intent to eliminate maximum rate adjustments for workers already at the maximum rate. The court, therefore, held that, under these circumstances, the rule that the Industrial Insurance Act is to be liberally construed in favor of injured workers, meant that EHB 2123 should not be interpreted to prevent an increase in Mr. Crabb's compensation rate effective July 1, 2011 to reflect the new maximum time loss rate. (CP, pp. 171 – 172).

Similarly, the Court of Appeals, in rejecting the Department's interpretation of the effect of EHB 2123, noted that denying Mr. Crabb the benefit of the maximum rate increase because the COLA was suspended by EHB 2123 "reads RCW 51.32.090(1) right out of the statutory scheme." *Crabb v. Dep't of Labor & Indus.*, ___ Wn.App. ___ (No. 44343-1-II, June 5, 2014)(slip. op.).

The one-year COLA freeze enacted in EHB 2123, did nothing to change the language of RCW 51.32.060, RCW 51.32.090(1), or RCW 51.32.090(9).[1] The only statutes amended by Part 2 of EHB 2123 were RCW 51.32.072 and RCW 51.32.075.

In Mr. Crabb's case, there is no need for him to receive a cost of living increase on his underlying time loss rate to keep him at the maximum time loss rate. There is no need to reference RCW 51.32.072 or RCW 51.32.075. A change in the language of these statutes is, therefore, irrelevant to Mr. Crabb's case.

The fact of the matter is that Mr. Crabb did not need a COLA since his original base time loss rate was higher than the July 1, 2011 maximum rate. When the maximum rate increased on July 1, 2011, Mr. Crabb's monthly rate should have increased to reflect this increase in the maximum rate cap.

E. THE SUGGESTION THAT EHB 2123 SOMEHOW ALTERED THE TIME LOSS RATE CALCULATION METHODS SET FORTH IN RCW 51.32.060, RCW 51.32.090(1), AND RCW 51.32.090(9) IS CONTRARY TO WELL ESTABLISHED LAW ON STATUTORY CONSTRUCTION.

The Department is arguing that EHB 2123 should be read to

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[1] Other sections of RCW 51.32.090 were amended EHB 2123 to create the "Washington Stay-at-Work Program." While this did not change any of the relevant substantive language, it did result in renumbering of the sections in RCW 51.32.090.

somehow alter the time loss rate calculation methods set forth for individuals such as Mr. Crabb in RCW 51.32.060, RCW 51.32.090(1), and RCW 51.32.090(9). This argument runs contrary to two well established rules for statutory interpretation.

First, absent a clear legislative intent, statutory language is to be interpreted using its plain and ordinary meaning. *Flannigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), citing *In re: Estate of Little*, 106 Wn.2d 269, 721 P.2d 950 (1986). Courts should not read language into a statute even if it believes the Legislature might have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002).

In this case, at the Board, it appears that the Industrial Appeals Judge improperly read a legislative intent into the statute based on his personal belief that it would be inequitable to allow high time loss rate individuals to get an increase in their time loss rate while lower rate individuals got no increase. (CABR, p. 16).

The Superior Court and the Court of Appeals correctly did not find such an intent. (CR, p. 170), *Crabb v. Dep't of Labor & Indus.*, ___ Wn.App. ___ (No. 44343-1-II, June 5, 2014)(slip. op.).

There is nothing in the plain language of EHB 2123 that changes the statutory scheme for calculating maximum time loss rates in cases such as Mr. Crabb's. Nor is there any evidence showing this as what the

legislature intended. The title of Part 2 of EHB 2123 references only cost of living adjustments, not maximum time loss rates, and nothing in the bill alters the method for calculating maximum time loss rates.

Second, when interpreting the Industrial Insurance Act, the Act is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); Citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 883 P.2d 1370 (1994) and *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). This means that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker..." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

The Department's interpretation of EHB 2123 in a way that would make it affect RCW 51.32.060, RCW 51.32.090(1), and RCW 51.32.090(9), sections that it does not address, was directly contrary to the rule that the Act is to be liberally construed. The Superior Court and Court of Appeals properly applied the liberal interpretation rule.

F. THE COURT OF APPEALS' DECISION DOES NOT LEAD TO AN "ABSURD" RESULT AS SUGGESTED BY THE DEPARTMENT.

In its brief, the Department argued that the "Court of Appeals decision provides for an absurd result that favors high earning workers and undercuts the legislature's intent to cut resources." This attempt by the Department to read intent into the legislation is without merit.

First, while EHB 2123 was meant to save money, these savings were not applied across the Board. The legislature did not cut all types of benefits. For example, no cuts were made to the amount of permanent partial disability paid to workers or the amounts paid for treatment or loss of earning power benefits. There is, therefore, nothing in the legislative intent to suggest that it was meant to freeze maximum rates.

The Department's suggestion that such a result would be "absurd" because it would result in high earners getting a raise while lower earners would not is also without merit. There are plenty of legitimate reasons that the legislature could have made such a decision. For example, workers capped at the maximum rate are typically already receiving a far lower percentage of their wage of injury that other workers. While non-capped workers receive anywhere from 60 to 75 percent of their earnings in their initial time loss rate, Mr. Crabb, due to the maximum rate cap, received less than 48 percent of his wage of injury ($4,258.40 maximum

rate / $8,917.92 wage of injury). (See Stipulation of Facts, Facts 1, 4, and 8). It is quite conceivable that the legislature decided that it would be unfair to further punish these workers by preventing them from benefiting from their normal maximum rate increase.

G. THE DEPARTMENT'S RELIANCE ON *HYATT* AND *LYNN* IS MISPLACED.

In its brief, the Department cited *Hyatt v. Dep't of Labor & Indus.*, 132 Wn.App. 387, 132 P.3d 148 (2006) and *Lynn v. Dep't of Labor & Indus.*, 130 Wn.App. 829, 125 P.3d 302 (2005), in support of its argument that Mr. Crabb's time loss rate cannot be adjusted. (Brief of Appellant, p. 14).

These cases do not support the Department's position in this case. In both *Hyatt* and *Lynn*, the claimants had wage orders that they had not appealed within 60 days, thus making them final, and which did not include an amount for health care benefits in the calculation of the workers' wages of injury. After the Supreme Court decision in *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001)[2], these claimant's tried to argue that the amount their employers paid for their health care benefits should now be added into their wage of injury

[2] In this decision, the Supreme Court ruled that the value of employer provided health care benefits should be included in a worker's wage of injury for purposes of calculating a time loss rate. Prior to the *Cockle* decision, it was the Department's practice to not include health care benefits in the wage of injury calculation.

calculations. The courts in both cases decided that since they had not appealed the wage orders, they were bound by the wages set out in those orders as the basis for calculating their time loss rates. *Hyatt v. Dep't of Labor & Indus.*, 132 Wn.App. 387, 132 P.3d 148 (2006) and *Lynn v. Dep't of Labor & Indus.*, 130 Wn.App. 829, 125 P.3d 302 (2005).

In this case, Mr. Crabb agrees that his wage order is final and binding. (CABR, p. 54). He is not arguing that the wage order should be changed in any way. The finality of the wage order has no bearing on whether or not Mr. Crabb's time loss compensation should have been adjusted when the maximum rate increased on July 1, 2011.

The only issue here is whether legislation that did not amend the language of the maximum rate statute, EHB 2123, should nonetheless be interpreted as preventing an adjustment in Mr. Crabb's maximum time loss rate. It should not be so interpreted.

H. MR. CRABB'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AND THE COURT OF APPEALS AS WELL AS FOR WORK DONE AT THE SUPREME COURT.

1. The awarding of attorneys' fees by the Superior Court and the Court of Appeals should be upheld.

Mr. Crabb's attorneys were awarded fees of $8,575.00 for work done at Superior Court (CP 169 - 173). The Department has not objected

to this amount in this appeal. If the Superior Court's verdict is otherwise upheld, the awarding of these amounts should also be upheld.

The Court of Appeals also awarded attorneys' fees in an amount to be set by a commissioner. The Department has not objected to this award, assuming the underlying decision is upheld. This award should also be upheld.

2. Mr. Crabb's attorneys should also be awarded fees for work done before the Supreme Court.

Rule 18.1 of the Rules of Appellate Procedure provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1.

RCW 51.52.130 provides that in workers' compensation cases, if a party other than the worker appeals a decision of the Board to superior or appellate court and the worker's right to relief is sustained, the worker is entitled to attorneys' fees for the work done before that court. Where the appellant is the Department, the fees fixed by the court are payable by the Department. RCW 51.52.130.

Mr. Crabb's attorneys, therefore, request that should the Supreme Court uphold the decision of the Court of Appeals, they be awarded

reasonable fees for work done on this appeal before this Court.

IV. CONCLUSION

This case does not meet the criteria set out in RAP 13.4(b) to warrant review by the Court.

The facts in this case were stipulated to so there is no dispute as to the material facts. Summary judgment is, therefore, appropriate in this case.

Mr. Crabb's base time loss rate, calculated pursuant to RCW 51.32.090(1) and RCW 51.32.060, before applying the maximum cap, is in excess of the maximum time loss rate. Therefore, his time loss rate for the period at issue in this appeal should have been $4,816.20, the maximum time loss rate as of July 1, 2011.

Nothing in EHB 2123 changes the statutory scheme for calculating maximum time loss rates in cases such as Mr. Crabb's. Neither the language of EHB 2123 nor any legislative history shows any intent by the legislature to alter the way maximum time loss rates are calculated. EHB 2123, therefore, should have no effect on this case.

The decision of the Court of Appeals was correct and review of this case should be denied.

Mr. Crabb and his attorneys also request that appropriate fees be awarded in accordance with RAP 18.1 and RCW 51.52.130.

DATED this 15th day of July, 2014.

SMALL, SNELL, WEISS & COMFORT, P.S.
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By: David W Lauman
David W. Lauman, WSBA #27343

SUPREME COURT
STATE OF WASHINGTON

JOSEPH C. CRABB, Respondent, v. DEPARTMENT OF LABOR & INDUSTRIES, Petitioner.	)	No. 90455-3 DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on this date, the respondent's Answer to Petition for Review and this Declaration of Service was filed via e-mail with the Supreme Court.

The undersigned also declares that the respondent's Answer to Petition for Review and this Declaration of Service was served to all parties on record as follows:

Sent via e-mail and US Mail, postage prepaid, to:

Steve Vinyard, AAG
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PO Box 40121
Olympia, WA 98504-0121
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DATED this 15th day of July, 2014.

Patricia Klein

OFFICE RECEPTIONIST, CLERK

To: Patti Klein
Subject: RE: Please file attached under Crabb v. Dep't of Labor & Indus.; Case No. 90455-3

Rec'd 7/15/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patti Klein [mailto:pak@sswc-law.com]
Sent: Tuesday, July 15, 2014 1:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: David Lauman
Subject: Please file attached under Crabb v. Dep't of Labor & Indus.; Case No. 90455-3

Re: Joseph C. Crabb v. Department of Labor and Industries
Case No. 90455-3

Attached for filing in Supreme Court are respondent's Answer to Petition for Review and Declaration of Service.

The filing party is respondent's attorney: David W. Lauman, WSBA #27343, (253) 472-2400, DWL@sswc-law.com.

Sincerely,

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